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Totti Trading v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-09–5–01 OF 2017
ZAKARIA SAM, VERNON ONG AND KAMARDIN HASHIM JJCA
11 DECEMBER 2017

C *Criminal Procedure — Jurisdiction of court — High Court — Whether High Court could set aside forfeiture order made earlier by court of concurrent jurisdiction — Whether forfeiture order was a final order — Whether order made in breach of natural justice — Whether High Court could invoke inherent powers or jurisdiction — Whether appellant ought to have proceeded with appeal*

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At all material times, Jow John Sing, the sole proprietor of the appellant, was the sole signatory of the appellant's Hong Leong Bank Bhd current account, in the Johor Bahru branch ('the bank account'). The Public Prosecutor filed a notice of motion that the sum of RM1,055,000 in the bank account ought to
E be seized and forfeited as they were proceeds from an offence under s 9 of the Exchange Control Act 1953 and hence related to an offence of money laundering under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). At the same time the public prosecutor also sought an order for the publication of a
F notice in the *gazette* for the appellant to attend before the High Court to show cause as to why the cash totaling RM1,055,000 in the bank account ought not to be forfeited. On the date of the hearing the High Court judge allowed the public prosecutor's application in default of appearance by the appellant and ordered the sum of RM1,055,000 to be credited to the Government of
G Malaysia ('the forfeiture order'). Consequently, the monies in the bank account were seized and credited to the Government of Malaysia. Some five years later, the appellant discovered for the first time about the existence of the forfeiture order and instructed its solicitors to file an application to set aside the forfeiture order. At the hearing of the application to set aside the forfeiture order, the
H respondent raised a preliminary objection that the High Court was functus officio as the forfeiture order made by the High Court was a final order. At the setting aside hearing, the High Court judge ('judge 2') found that the High Court had no jurisdiction to set aside the forfeiture order and that the court could not invoke its inherent power to set aside the forfeiture order as there was
I another remedy available to the applicant, namely to appeal against the order made. Thus, judge 2 upheld the preliminary objection by the respondent and dismissed the appellant's application to set aside the forfeiture order. The appellant appealed against the decision of judge 2 on the grounds, that judge 2 had erred in holding that he had no jurisdiction to set aside the forfeiture order

as it was a final order. The appellant argued that the forfeiture order was not a final order because it was not made after hearing the appellant, but instead was a default order made in the absence of the appellant. The appellant further submitted that since the forfeiture order was made in breach of the rules of natural justice, judge 2 was seized with the inherent jurisdiction to set it aside.

Held, allowing the appeal:

(1) Although as a general rule one High Court could not set aside a final order regularly obtained from another High Court of concurrent jurisdiction, the forfeiture order that was made in the present case was a default order that was made in the absence of the appellant and without hearing the appellant. As such, it was an order made in breach of natural justice and liable to be set aside *ex debito justitiae* by judge 2 in the exercise of the inherent jurisdiction of the court. In the circumstances, judge 2 had clearly erred when he allowed the preliminary objection of the public prosecutor (see paras 16 & 20).

(2) In the present case, the appellant had not appealed to the High Court and was not seeking for the High Court to review or overrule the earlier forfeiture order. Therefore, the forfeiture order was not a final order and it was not appealable. Instead, the appellant had applied to set aside the forfeiture order by asking the High Court (judge 2) to invoke its inherent powers to set aside the forfeiture order on the grounds of breach of the rules of natural justice and/or on the maxim of *audi alteram partem*, nullity and illegality. The High Court had inherent powers or jurisdiction to be invoked when it was necessary to prevent injustice and to do justice especially in cases where a blatant breach of the rules of natural justice occurred derived from s 25(1) of the Courts of Judicature Act 1964 as well as ss 4 and 5 of the Criminal Procedure Code. As such, judge 2 was competent to set aside the forfeiture order earlier made (see paras 27–28).

(3) Even though an alternative remedy by way of appeal was available to the appellant, the fact that the forfeiture order was a nullity as it was in breach of the rule of natural justice and not regularly obtained, meant that the appellant was entitled in law to apply to set aside the impugned order without resort to filling of an appeal. In the circumstances, the appeal ought to be allowed and the appellant's application to set aside the forfeiture order should be remitted back to the High Court to be heard (see paras 31 & 34).

[Bahasa Malaysia summary

Pada setiap masa matan, Jow John Sing, pemilik tunggal perayu, merupakan penandatangan tunggal akaun semasa Hong Leong Bank Bhd perayu, di cawangan Johor Bahru ('akaun bank'). Pendakwa raya memfailkan notis usul bahawa jumlah RM1,055,000 dalam akaun bank sepatutnya dirampas dan

A dibatalkan kerana ia adalah hasil daripada kesalahan di bawah s 9 Akta Kawalan Pertukaran 1953 dan justeru berkaitan dengan kesalahan pengubahan wang haram di bawah s 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('Akta tersebut'). Pada masa yang sama, pendakwa raya juga meminta perintah untuk menerbitkan notis dalam
B *warta* agar perayu menghadirkan diri di hadapan Mahkamah Tinggi untuk menunjukkan sebab mengapa wang tunai berjumlah RM1,055,000 dalam akaun bank sepatutnya tidak dilucuthakkan. Pada tarikh perbicaraan hakim Mahkamah Tinggi membenarkan permohonan pendakwa raya untuk ingkar hadir oleh perayu dan memerintahkan jumlah RM1,055,000 dikreditkan
C kepada Kerajaan Malaysia ('perintah pelucuthakan'). Akibatnya, wang dalam akaun bank telah disita dan dikreditkan kepada Kerajaan Malaysia. Sekitar lima tahun kemudian, perayu mendapati buat kali pertama tentang kewujudan perintah pelucuthakan itu dan mengarahkan peguamnya untuk memfailkan
D permohonan untuk mengetepikan perintah pelucuthakan itu. Semasa perbicaraan untuk permohonan mengetepikan perintah pelucuthakan itu, responden menimbulkan bantahan awal bahawa Mahkamah Tinggi adalah *functus officio* kerana perintah pelucuthakan yang dibuat oleh Mahkamah Tinggi adalah perintah muktamad. Dalam perbicaraan penepian, hakim
E Mahkamah Tinggi ('hakim 2') mendapati bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mengetepikan perintah pelucuthakan itu dan bahawa mahkamah tidak boleh menggunakan kuasa sedia adanya untuk mengetepikan perintah pelucuthakan itu kerana terdapat satu lagi remedi yang sedia ada kepada pemohon, iaitu merayu terhadap perintah yang dibuat. Oleh
F itu, hakim 2 menekalkan bantahan awal oleh responden dan menolak permohonan perayu untuk mengetepikan perintah pelucuthakan itu. Perayu merayu terhadap keputusan hakim 2 dengan alasan bahawa hakim 2 telah terkhilaf dalam memutuskan bahawa beliau tidak mempunyai bidang kuasa untuk mengetepikan perintah pelucuthakan itu kerana ia merupakan perintah
G muktamad. Perayu berpendapat bahawa perintah pelucuthakan itu bukan perintah muktamad kerana ia tidak dibuat selepas mendengar perayu, tetapi sebaliknya merupakan perintah ingkar yang dibuat tanpa kehadiran perayu. Perayu selanjutnya telah mengemukakan bahawa oleh kerana perintah pelucuthakan itu telah dibuat dengan melanggar rukun keadilan asasi, hakim 2
H tidak mempunyai bidang kuasa sedia ada untuk mengetepikannya.

Diputuskan, membenarkan rayuan:

(1) Walaupun sebagai rukun am suatu Mahkamah Tinggi tidak boleh mengetepikan perintah muktamad biasanya diperolehi dari Mahkamah
I Tinggi lain yang mempunyai dalam bidang kuasa yang sama, perintah pelucuthakan yang dibuat dalam kes ini adalah suatu perintah ingkar yang dibuat tanpa kehadiran perayu dan tanpa mendengar perayu. Oleh itu, ia merupakan suatu perintah yang dibuat melanggar keadilan asasi dan patut diketepikan *ex debito justitiae* oleh hakim 2 dalam

melaksanakan bidang kuasa yang sedia ada mahkamah. Dalam hal keadaan ini, hakim 2 telah jelas terkhilaf apabila beliau membenarkan bantahan awal pendakwa raya (lihat peranggan 16 & 20).

(2) Dalam kes ini, perayu tidak mengemukakan rayuan kepada Mahkamah Tinggi dan tidak memohon Mahkamah Tinggi untuk mengkaji semula atau menolak perintah pelucuthakan yang terdahulu. Oleh itu, perintah pelucuthakan itu bukanlah perintah muktamad dan ia tidak boleh dirayu. Sebaliknya, perayu telah memohon untuk mengetepikan perintah pelucuthakan itu dengan memohon Mahkamah Tinggi (hakim 2) untuk menggunakan kuasa sedia adanya untuk mengetepikan perintah pelucuthakan itu atas alasan pelanggaran rukun keadilan asasi dan/atau maxim *audi alteram partem*, pembatalan dan menyalahi undang-undang. Mahkamah Tinggi mempunyai kuasa sedia ada atau bidang kuasa untuk digunakan apabila perlu untuk mengelakkan ketidakadilan dan melakukan keadilan terutama dalam kes-kes di mana pelanggaran rukun keadilan asasi berlaku berdasarkan s 25(1) Akta Mahkamah Kehakiman 1964 dan juga ss 4 dan 5 Kanun Tatacara Jenayah. Oleh itu, hakim 2 adalah kompeten untuk mengetepikan perintah pelucuthakan yang dibuat terdahulu (lihat perenggan 27–28).

(3) Walaupun suatu remedi alternatif melalui rayuan sedia ada kepada perayu, hakikat bahawa perintah pelucuthakan itu adalah suatu pembatalan kerana melanggar rukun keadilan asasi dan tidak kerap diperolehi, bermaksud perayu itu berhak dari segi undang-undang untuk memohon untuk mengetepikan perintah yang dipersoalkan tanpa perlu memfailkan rayuan. Dalam keadaan ini, rayuan itu patut dibenarkan dan permohonan perayu untuk mengetepikan perintah pelucuthakan hendaklah dihantar kembali ke Mahkamah Tinggi untuk didengar (lihat perenggan 31 & 34).]

Notes

For cases on High Court, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2929–2944.

Cases referred to

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1, FC (refd)

Azmi bin Osman v PP and another appeal [2016] 3 MLJ 98; [2015] 9 CLJ 845, CA (distd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Cameron v Cole [1944] HCA 5; [1944] 68 CLR 571, HC (refd)

CIMB Investment Bank Bhd (previously known as Commerce International

Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779; [2014] 9 CLJ 1012, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158; [2010] 7 CLJ 397, FC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544; [1991] 2 CLJ 1458, SC (refd)
Lee Gee Pheng v RHB Bank Bhd [2004] 1 MLJ 618; [2003] 4 CLJ 639, CA (refd)
PP v Dato' Saidin bin Thamby [2012] 3 MLJ 476; [2012] 4 CLJ 15, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4, 4(1), 4(1)(a), 32, 44, 50, 56, 56(1), 61, 61(2)
Courts of Judicature Act 1964 ss 3, 25(1)
Criminal Procedure Code ss 4, 5
Exchange Control Act 1953 (revoked by the Financial Services Act 2013) s 9
Federal Constitution arts 13, 13(1), 160

Appeal from: Criminal Application No 44–25 of 2011 (High Court, Johor Bahru)

Geethan Ram Vincent (Elizabeth Shanti, Frida Krishnan and Lavaniya Raja with him) (The Chambers of Frida) for the appellant.
Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge at Johor Bahru given on 6 March 2017 dismissing the appellant's application to set aside the forfeiture order made by the High Court on 25 November 2011.

BACKGROUND FACTS

[2] The background facts are these. On 22 August 2011 the public prosecutor filed an in application encl 2 for a forfeiture order pursuant to s 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA'). By encl 2 the public prosecutor also sought for an order for the publication of a notice in the *gazette* pursuant to s 61(2) of the AMLATFA for the appellant to attend before the High Court to show cause as to why cash totaling RM1,055,000 or any accredition to it in the appellant's current account with Hong Leong Bank,

account No 00500116205 ought not to be forfeited. A

[3] On the appointed date of hearing ie 25 November 2011, Justice Dato' Abd Halim bin Aman ('the learned judge 1'), allowed the public prosecutor's application in default of appearance by the appellant and ordered the sum of RM1,055,000 be credited to the Government of Malaysia ('the forfeiture order'). B

[4] Some five years later, in 2016, the appellant discovered for the first time about the existence of the forfeiture order. The appellant then instructed its solicitors to file on application to set aside the said forfeiture order. The appellant's application by way of notice of motion was filed on 4 July 2016. C

[5] The appellant's application came before Justice Dato' Indera Mohd Sofian bin Tan Sri Abdul Razak ('the learned judge 2') for disposal on the 6 March 2017. Prior to the hearing of the application to set aside the forfeiture order, the respondent raised a preliminary objection ('PO') that the High Court was *functus officio* as the order dated 25 November 2011 was a final order. D

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[6] The learned judge 2 proceeded to hear the preliminary objection and requested parties to addressed on the following four issues for the court's determination:

(a) is the High Court judge herein competent to set aside the earlier order dated 25 November 2011 made by another previous High Court judge in this case? F

(b) whether Totti Trading can invoke the inherent powers of the High Court to set aside the order dated 25 November 2011 in a criminal proceeding/case? G

(c) whether the application to set aside the order dated 25 November 2011 should be made under the same suit herein or a fresh suit/proceeding? and

H

(d) whether the order dated 25 November 2011 is a final order, and Totti Trading should have appealed against the said order?

[7] After hearing the parties, the learned judge 2 upheld the PO by the respondent and thereby dismissed the appellant's application to set aside the forfeiture order on the following grounds: I

(a) firstly, the court was of the view that since the relief sought by the applicant was to set aside the order dated 25 November 2011 made in

A the suit No 44–25 of 2011, then the proper mode of proceeding was to file an application under the same suit number and not to file a fresh application under a fresh suit or proceeding — (see p 14, para 2, *Jld* 1 of the AR);

B (b) secondly, the court was of the considered view that the order made on 25 November 2011 was a final order made by the earlier High Court judge. It was a final order because it disposed of the matter in that the money was to be forfeited to the government. At this juncture the court was not concern whether the earlier HC judge had made a correct ruling C and/or decision but whether the ruling and/or decision was appealable or not (the court referred to the meaning of the term 'decision' as defined in s 3 of the Courts of Judicature Act 1964 ('the CJA')) — (see p 14, para 3, *Jld* 1 of the AR);

D (c) the court was of the view that since it was a final order, the only proper recourse for the applicant was to appeal to the Court of Appeal to challenge the order made on ground as adumbrated earlier by the applicant such as not given the right to be heard in breach of rules of natural justice and the order made was a nullity — (see p 14, para 4 and E p 15, para 1, *Jld* 1 of the AR);

(d) the court was of the opinion that it had no jurisdiction to set aside the order dated 25 November 2011 made by another High Court of concurrent jurisdiction — (see p 15, para 1, *Jld* 1 of the AR);

F (e) the court too could not invoke its inherent power to set aside the order dated 25 November 2011 because there is another remedy available to the applicant namely to appeal against the order made — (see p 15, paras 2 and 4, *Jld* 1 of the AR); and

G (f) the court could not also hear the application to set aside as the subject matter was not procedural matter but substantive in nature — (see p 16, para 1, *Jld* 1 of the AR).

[8] For the above stated reasons, the learned judge 2 held that it had no H jurisdiction to set aside the order dated 25 November 2011 granted earlier by the learned judge 1 and dismissed the appellant's application. The learned judge 2 was also of the view that it was functus officio. The learned judge 2 in his judgment said:

I In this regards, the court was of the view that since it was a final order, the only proper recourse for the applicant was to appeal to the Court of Appeal to challenge the order made on ground as adumbrated earlier by the applicant such as not given the right to be heard in breach of rules of natural justice and the order made was a nullity. The court was of the opinion that it has no jurisdiction to set aside the order dated 25 November 2011 made by another High Court of concurrent jurisdiction.

The court too could not invoke its inherent power to set aside the order dated 25 November 2011 because there is another remedy available to the applicant namely to appeal against the said order made.

[9] In coming to his decision, the learned judge 2 relied on the Court of Appeal's decision in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845, as submitted by the respondent, in arriving at his decision.

[10] Aggrieved with the decision of the learned judge 2, the appellant appealed to this court. We heard the appeal on 9 October 2017. After hearing the parties, we allowed the appeal. These were the reasons for us in allowing the appeal.

THE RESPONDENT'S FORFEITURE APPLICATION — SOME BACKGROUND FACTS

[11] Before we go any further, it is pertinent for us to look at some background facts of the respondent notice of motion dated 22 August 2011 in encl 2. The some background facts can be deduced from the affidavits in support of the application in encl 2 sworn in by Mohd Haziq Dhiyauddin bin Razali, the deputy public prosecutor in charge of the matter and two affidavits sworn in by one Md Suhardi bin Md Shaari, an investigating officer with the Central Bank of Malaysia and also from the affidavit in support of Jow John Sing, sworned on behalf of the appellant.

[12] Based on the three affidavits, disclosed the following facts:

(a) Jow John Sing ('Jow') was previously the sole proprietor of the appellant and the sole signatory to the Hong Leong Bank Bhd's account No 00500116205, Johor Bahru Branch ('HLBB account') where the cash of RM1,055,000 subjected to the forfeiture order was;

(b) the appellant's HLBB account was frozen under s 44 of the AMLATFA on 23 August 2010;

(c) Jow was served with the order dated 23 August 2010 to freeze the HLBB account under s 44 of the AMLATFA on 25 August 2010;

(d) Jow's statement pursuant to s 32 of the AMLATFA was recorded on the same day ie on 25 August 2010;

(e) HLBB was issued with an order dated 18 November 2010 to seize all monies in the HLBB account under s 50 of the AMLATFA;

(f) the respondent filed the notice of motion in encl 2 dated 22 August 2011 against the appellant pursuant to ss 56(1) and 61(2) of the

AMLATFA in essence to:

> memanggil mana-mana pihak ketiga yang menuntut mempunyai apa-apa kepentingan mengenai harta-harta alih di atas supaya hadir di hadapan Mahkamah pada tarikh yang dinyatakan dalam notis untuk menunjuk sebab mengapa harta-harta alih yang telah disita tidak boleh dilucuthakkan dan seterusnya memohon Mahkamah yang Mulia ini melucuthakkan — akaun semasa bernombor 00500116205 di Hong Leong Bank Berhad cawangan Johor Bahru, Johor milik Totti Trading Nombor Pendaftaran Perniagaan JM 0374701-W di Hong Leong Bank Berhad cawangan Johor Bahru, Johor dan wang di dalamnya yang berjumlah RM1,055,000.00 dan apa-apa pertambahan kepadanya yang disita pada 18.11.2010 kepada kerajaan Malaysia;

(g) pursuant to s 61(2) of the AMLATFA, the notice to third parties was published in the *gazette* dated 25 October 2011 calling upon any third party who claims to have any interest in the property to attend before the court on 25 November 2011 @ 8.30am to show cause as to why the property shall not be forfeited;

(h) on 25 November 2011, the High Court made an order crediting the sum of RM1,055,000 to the Government of Malaysia;

(i) there was no prosecution or conviction for an offence under s 4(1) of the AMLATFA; and

(j) the respondent's notice of motion in encl 2 was premised on the grounds that the monies seized in the appellant's HLBB account and later forfeited were proceeds from an offence under s 9 of the Exchange Control Act 1953 ('the ECA'), and hence is related to an offence of money laundering under s 4(1)(a) of the AMLATFA. The offence under s 9 of the ECA was the purported predicate offence.

THE APPEAL

[13] Before us, learned counsel for the appellant canvassed two main grounds, namely:

(a) that the learned trial judge 2 erred in holding that he had no jurisdiction to set aside the forfeiture order dated 25 November 2011 granted by the learned judge 1; and

(b) that the learned judge 2 erred in holding that the appellant must only appeal and that he could not exercise his inherent powers to set aside the forfeiture order.

OUR DELIBERATIONS AND DECISIONS

[14] In regard to the first ground, learned counsel submitted that learned judge 2 erred when His Lordship held that the forfeiture order dated 25 November 2011 was a final order. Learned counsel argued that the forfeiture order is not a final order because it was not made after hearing the appellant. Instead it was a default order made in the absent of the appellant. The appellant was not heard before the forfeiture order was granted by the learned judge 1.

[15] Learned counsel further argued that the forfeiture order was made in breach of the rules of natural justice. Therefore, the learned judge 2 was seized with the inherent jurisdiction to set aside the forfeiture order. The learned counsel relied on *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where the Federal Court held:

> Clearly the court has no power under any application in the same action to after, vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up, ... *unless it is a judgment by default or made in the absence of a party at the trial or hearing.* (Emphasis added.)

[16] We agreed with the learned counsel submission on the issue raised in the first ground of appeal. The principle laid down in *Hock Hua Bank Bhd* had been duly fortified by the Federal Court in *Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 where it was decided as follows:

> It is of course settled law as lain down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly, in this country the statement of Abdoolcader J (as he then was) in

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[17] In a more recent decision in *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779; [2014] 9 CLJ 1012, the Federal Court held:

> In *Badiaddin*, the Federal Court settled that there is inherent and discretionary jurisdiction to set aside *ex debito justitiae* an order of court regularly obtained where there has been a breach of the rules of natural justice following the Privy Council case of *Isaacs v Robertson* [1984] 3 All ER 140; [1985] AC 97.

[18] In the Australian case of *Cameron v Cole* [1944] HCA 5; [1944] 68 CLR 571, it was held:

> It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. It this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside: *Craig v Kanssen* 1943.

[19] We refer to art 13(1) of the Federal Constitution which protect the rights of one property. Article 13 guaranteed that 'no person shall be deprived of property save in accordance with law'. Whereas art 160 of the Federal Constitution defined 'law' to includes 'written law, the common law in so far as it is in operation in the Federation or any part thereof, or any custom or usage having the force of law in the Federation or any part thereof'. We are of the view that the rules of natural justice and procedure which form an integral part of the common law must be fully satisfied before one's property can be forfeited without any compensation. The right to be heard is one of the pillars of the rules of natural justice. Any breach of these rules amount to a contravention of art 13 of the Federal Constitution

[20] We agreed with learned counsel's submission that the forfeiture order being a default order made in the absence of the appellant and without hearing the appellant, is an order in breach of natural justice and therefore liable to be set aside on *ex debito justitiae* by the learned judge 2. The learned judge 2 had

clearly erred when His Lordship allowed the PO of the learned deputy public prosecutor.

[21] In *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169, the Privy Council held:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179; 182 27 TLR 378 down to the decision of Their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC).
>
> It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to Their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* [1951] 2 TLR 1189 to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445 and many others. (Emphasis added.)

[22] The Privy Council then went on to set aside the disciplinary proceedings for breach of natural justice. At p 178 of the reported case, Lord Denning held:

> Applying these principles Their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words: In my view the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.

[23] The learned deputy public prosecutor (the learned deputy) argued that one High Court judge cannot overrule another High Court judge who made the decision at some crucial stage of proceedings in the same case. The learned deputy relied on this court's decision in *Azmi bin Osman v Public Prosecutor and another appeal*. Much as we agree with the proposition enunciated in that decision, nevertheless, the facts of that case are clearly distinguishable and different from the present case at hand.

[24] In *Azmi bin Osman v Public Prosecutor and another appeal*, the facts disclosed as follows:

(a) Azmi ('the accused') was charged before the sessions court in Johor Bahru on four charges of money laundering under s 4 of the AMLAFTA;

(b) at the end of the prosecution case, the sessions court judge ('the SCJ') found that the prosecution had failed to establish a prima facie case on all the four charges, and acquitted the accused without calling for his defence;

(c) the prosecution appealed to the High Court ('the first appeal') against this decision of the SCJ. The first appeal was heard by the High Court judge 1 ('the HCJ 1'), who allowed the appeal and ordered the accused to answer to all the four charges before the sessions court;

(d) after hearing evidence for the defence, the same SCJ this time convicted the accused on all four charges and sentenced him. The SCJ also ordered a third forfeiture of the property of the accused that were seized;

(e) aggrieved by this decision of the SCJ, the accused appealed to the High Court against the conviction, sentence and order of the issuance of the notice under s 61 ('the second appeal');

(f) the second appeal was heard by the High Court judge 2 ('the HCJ 2'), who made the following orders:

(i) having reviewed the ruling of the HCJ1 on whether defence ought to have been called, the HCJ 2 found that the accused ought not to have been called to enter his defence on all the four charges;

(ii) upon review, the HCJ2 found that the prosecution had not established a prima facie case on all four charges;

(iii) the HCJ2 acquitted the accused;

(iv) then went on to hold that assuming he was wrong in his finding that prosecution had not proved a prima facie case, he proceeded to consider the defence and concluded that the SCJ was correct in finding the accused guilty as his version was to improbable and did not create any reasonable doubt in the prosecution case; and

(v) that the issue of a notice under s 61 of the AMLAFTA by the SCJ was affirmed;

(g) the prosecution appealed against the order of acquittal and discharge of the HCJ2, and the accused appealed against the issuance of the s 61 notice to the Court of Appeal; and

(h) before the Court of Appeal, the prosecution raised a preliminary issue:

whether the *HCJ2* in dealing with an appeal from the SCJ against conviction, was *competent to review* the evidence led at the prosecution stage, in determining whether there was a prima facie case established and for defence to be called, as had been found by the HCJ1, when the HCJ1 allowed the appeal by the prosecution against the order of acquittal at the end of the prosecution stage of the same case.

[25] The Court of Appeal held at p 859, as follows:

[28] With respect, we are of the view that the learned HCJ2 had erred when he disturbed the findings of the earlier HCJ1 who had ordered the accused to enter on his defence to all the four charges, on appeal. The dominant issue that ought to guide the HCJ2's mind in dealing with a situation that has now become this preliminary issue must of necessity be the fact that when the HCJ1 made that decision for defence to be called, the latter was carrying out his appellate jurisdiction. Granted that the High Court jurisdiction is coordinate among its judges, inherent in that concept is the fact that a High Court judge cannot overrule another High Court judge who had made a decision at some crucial stage of proceedings in the same case. In the context of this appeal before us, the HCJ1 had ordered the accused's defence to be called to answer to the four charges leveled against him. The jurisdiction to correct that purported error, said by the HCJ2 as having been committed by the HCJ1, with respect, lies with the Court of Appeal, should there be an appeal against the decision of the HCJ2. In other words, as much as a High Court judge's decision does not bind his brother or sister judge on the High Court bench, by the same token, neither does it lie with his brother or sister judge of the High Court to overturn his decision in the same case. In a situation now prevailing in this case, the role of the HCJ2 is only limited to see whether the defence evidence as led has succeeded in creating a reasonable doubt in the prima facie case as found by the HCJ1 on appeal by the prosecution. With respect, this must be preferred position as to what the proper approach ought to be, as was employed by the Court of Appeal in *Sulaiman*'s case. Coordinate jurisdiction connotes parity and as such, it does not admit nor permit mutual overriding or overruling each other's decision. Only a higher appeal court can disturb or vary or affirm a High Court's decision.

[29] In the context of the situation that arose in this case before us, it is therefore our view that the reason advanced by the learned HCJ2 that had purportedly provided him with the power to review the HCJ1 decision to call for the defence to be entered was, with respect, flawed and erroneous. As such, on the preliminary issue raised by the learned deputy, we find that there is merit in his contention. The learned HCJ2 was wrong in reviewing and overturning the earlier decision of the HCJ1, in the first appeal by the prosecution. His role, in the circumstances, as stated above, is limited to determining whether the defence had raised a reasonable doubt at the end of the defence case.

[26] It is thus clear that in *Azmi Osman*'s case that:

(a) the HCJ2 in the second appeal had reviewed and overruled the decision of the HCJ1 in the first appeal, wherein the HCJ1 was carrying out his appellate jurisdiction;

(b) the HCJ2's role was limited to only determining the issue in the second appeal before him, ie 'whether the defence had raised a reasonable doubt at the end of the defence case';

(c) the HCJ2's role was not to overrule the HCJ1's decision in the first appeal ie 'whether the defence ought to have been called', which appeal was not before the HCJ2 in the second appeal. The HCJ2 had gone beyond his scope in the second appeal; and

(d) the HCJ2 was wrong in reviewing and overturning the decision of the HCJ1 in the first appeal. The jurisdiction to correct any purported error of the HCJ1 lies with the Court of Appeal.

[27] In the present case, the appellant had not appealed to the High Court and was not seeking for the High Court to review or overrule the earlier decision made by learned trial judge 1. Therefore, in our view the forfeiture order dated 25 November 2011 is not a final order and it is not appealable. What the appellant asking for is for the learned judge 2 to invoke its inherent powers to set aside the forfeiture order on the grounds of breach of the rules of natural justice and/or on the maxim of *audi alteram partem*, nullity and illegality. We are also of the view that the learned judge 2 can and is competent to set aside the forfeiture order earlier made by learned judge 1 in this case before us.

[28] The High Court is armed with inherent powers or jurisdiction to be invoked when it is necessary to prevent injustice and to do justice especially in cases where a blatant breach of the rules of natural justice occurred. The High Court derived the inherent powers or jurisdiction from s 25(1) of the Courts of Judicature Act 1964 as well as ss 4 and 5 of the Criminal Procedure Code to arrest a wrong (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158; [2010] 7 CLJ 397; *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 2 CLJ 1458, *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1).

[29] It was not disputed by the respondent that the forfeiture order was obtained without the knowledge of the appellant. What the learned deputy argued before us was the delay in the appellant to file their application to set aside the forfeiture order. It was not denied as well that the appellant was not heard before the forfeiture order was churned out by the learned judge 1. In this respect, we agreed that it was crystal clear that the rule of natural justice had been breached. On this natural justice application we can do no better than

reproduce Abdul Malik Ishak, JCA explanation in *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ 476; [2012] 4 CLJ 15, as follows:

[148] As to the meaning of 'natural justice', the case of *Walter Annamunthodo* at p 949 explains it lucidly in this way:

> 'Natural justice' is not the same thing as sophisticated justice; the most famous passage on the point is in *Local Government Board v Arlidge* [1915] AC 120 138; 30 TLR 672 (HL). There are three basic elements which, by and large, make up the sum of natural justice: (i) The complainant must be given fair notice of the charge against him; (ii) He must have a fair opportunity of meeting that charge, and under that is included a fair hearing, (iii) The tribunal must reach a decision which is honest and unbiased. The authority for those three propositions is Bowen LJ in *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 383 (CA).

[149] When we talk about natural justice, we are referring to the specific procedural rights in the English legal system which are adopted by our courts. It concerns the duty to act fairly. Natural justice encompasses two basic rules, namely, the rule against bias (*nemo judex in causa sua*) and the right to a fail trial (*audi alteram partem*).

[150] The rule against bias is grounded on the need to maintain public confidence in our legal system. There are two forms of bias. Firstly, actual bias. Secondly, imputed bias or apparent bias. It is very difficult to prove actual bias. Whereas imputed bias, once established, will render a decision being void without the need for any investigation into the likelihood or suspicion of bias.

[150] Everyone is entitled to a fair hearing. Individuals should not be penalised by decisions that affect their rights or legitimate expectations unless they have been given prior notice about the case so that they have a fair opportunity to answer ant to present their own case.

[151] To maintain public confidence in the legal system, the basic concept of impartiality must be adhered religiously. Lord Denning, the Master of the Rolls, in *Metropolitan Properties Co (FGC) Ltd v Lannon And Others*, *Regina v ondon Rent Assessment Panel Committee, Ex parte Metropolitan Properties Co (FGC) Ltd* [1968] 3 WLR 694; [1969] 1 QB 577 (CA) aptly said at p 599:

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

[152] Lord Hewart, the Lord Chief Justice of England and Wales, said that, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' (*The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 246 at p 259).

[153] Here, the trial court invoked s 8 of the PCA in its written judgment written two years after the respondent was convicted without giving prior notice to the respondent or the respondent's counsel. Natural justice allows the respondent or the respondent's counsel to claim the right to adequate notification before the trial court invoked s 8 of the PCA in its written judgment. Chief Justice William Erl in *Cooper v The Board of Works for the Wandsworth District* [1863] 14 CB (NS) 180 at p 414 held that the lack of notice and hearing afforded to *Cooper* could be said to be a form

of abuse as he had been treated as if he did not matter.

[154] And Lord Mustill in *Regina v Secretary of State for the Home Department, Ex parte Doody*, *Same v Same, Ex parte Pegg*, *Same v Same, Ex parte Pierson*, *Same v Same, Ex parte Smart* [1944] 1 AC 531 (HL) at p 560, had this to say about fail hearing:

> Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.

[30] As regards to the delay in filing the application to set aside the impugned order, this had been explained in Jow's affidavit that there had been constant communications and correspondences between the appellant and the respondent. The respondent even recorded Jow's statement on the 25 August 2010, three days after the notice dated 23 August 2010 was issued. Jow's contact numbers had been revealed to the respondent but the respondent through the investigating officer was unable to served the notice or to inform the appellant of the hearing date fixed by the court. If we have to look at the affidavit *tambahan* of the investigating officer, there was only one attempt had been made to serve the notice on the appellant at both the appellant's addresses on the same day ie 22 August 2011. There was already solicitors on record acting for the appellant at the time ie Messrs Hanif Hassan & Co, but they were not informed either of the hearing date. It is observed from the record that the *gazette* was done on the 25 October 2011 and the impugned order was issued on 25 November 2011, on the first hearing date itself fixed by the court which is also the date stated in the *gazette*. We are of the view that the forfeiture order was infact not in order and not regularly obtained.

[31] With that, we now move to the second ground of appeal that the learned judge 2 erred in holding that the appellant must only go by way of an appeal to set aside the forfeiture order. Learned judge 2 stated in his judgment that he could not exercise his inherent powers because there was an alternative remedy available to the appellant and that was to appeal the decision to the Court of Appeal. We agree with learned counsel for the appellant that even though alternative remedy by way of appeal was available to the appellant, nevertheless, the fact that the forfeiture order is a nullity as it was in breach of the rule of natural justice and to add, not regularly obtained, the appellant is entitled in law to apply and set aside the impugned order without resort to filling of an appeal.

[32] In *Badiaddin*'s case, this point is clear that:

> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure ...

[33] In *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618; [2003] 4 CLJ 639, the Court of Appeal had held:

> The appellant also complaint that the learned judge erred in law and in fact in ruling that he was functus officio when deciding on the application. It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is functus officio. The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exception which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:
>
> (i) ...;
>
> (ii) ...;
>
> (iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (refd).
>
> (iv) ...; and
>
> (v) ...

CONCLUSION

[34] In the upshot, we allowed the appeal. We ordered that the matter to be remitted back to the Johor Bahru High Court to hear the appellant's application to set aside the forfeiture order dated 25 November 2011 on merits.

[35] We so ordered.

Appeal allowed.

Reported by Kohila Nesan